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No. _____

In the Supreme Court of the United States

CANDELARIO HOLGUIN, JR.,
Petitioner,

v.

RICK THALER,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the state habeas court's finding that the failure of trial counsel to present evidence that the only eyewitness to identify Petitioner suffered from severe vision problems was not ineffective was an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) such that trial counsel should have been found to have rendered ineffective assistance of counsel?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Candelario Holguin, Jr. asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The findings and recommendation of the Magistrate Judge for the Northern District of Texas, Dallas Division are attached to this petition as Appendix E. The order adopting these findings by the United States District Court for the Northern District of Texas is attached hereto as Appendix D. The judgment of the District Court denying Holguin's petition for a writ of habeas corpus is attached as Appendix C. The opinion of the District Court denying Holguin's Application for Certificate of Appealability is attached as Appendix B. The opinion of the Fifth Circuit Court of Appeals denying Holguin's Application for Certificate of Appealability is attached as Appendix A.

JURISDICTION

On July 10, 2009, the District Court denied Holguin's application for a certificate of appealability. The United States Court of Appeals for the Fifth Circuit denied Holguin's certificate of appealability on February 25, 2010. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), Mr. Holguin having asserted below and in this petition the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the right to effective assistance of counsel under the Sixth Amendment to United States Constitution.

   U.S. Const. Amend. VI reads as follows:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. This case involves the proper application of 28 U.S.C. §2254 which reads, in part, as follows:

   (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
   (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Overview

Holguin was indicted by the Dallas County, Texas Grand Jury for three offenses of engaging in organized criminal activity. Holguin entered pleas of not guilty to the indictments and proceeded to trial on all three indictments before a single jury. The jury found Holguin guilty as charged in all three cases. The jury then assessed Holguin's punishment at confinement in the Institutions Division of the Texas Department of Criminal Justice for forty-five (45) years in each case. The trial judge sentenced Holguin in accordance with the jury's verdicts. (Vol. 1: 58-69).

Holguin gave timely notice of appeal to the Court of Appeals for the Fifth District of Texas. Holguin's appeal was subsequently transferred to the Court of Appeals for the Eighth District of Texas. On February 15, 2001, the Court of Appeals affirmed Holguin's convictions. (Vol. 1: 71-140).

Holguin filed petitions for discretionary review in the Court of Criminal Appeals of Texas. On September 12, 2001, the Court of Criminal Appeals refused those petitions. (Vol. 1: 141).

Holguin sought writs of certiorari in the United States Supreme Court. These petitions were denied on February 19, 2002. (Vol. 1: 143; Vol. 2: 452-474).

Holguin filed applications for writs of habeas corpus in the state trial court on January 13, 2003. Holguin amended those applications on April 29, 2005. Holguin filed a supplemental application on March 12,

2007. (Vol. 1: 145-188). The applications for writ of habeas corpus were denied by the Court of Criminal Appeals on April 30, 2008, based on findings entered by the trial court following a hearing. (Vol. 1: 189-264; Vol. 2: 265-291).

On May 29, 2008, Holguin filed a Petition for a Writ of Habeas Corpus by a Person in State Custody in the United States District Court for the Northen District of Texas. (Vol. 1: 5-363). On January 8, 2009, the United States Magistrate Judge filed his Findings, Conclusions and Recommendation of the United States, in which he recommended that Holguin's petition for a writ of habeas corpus be denied and dismissed. (Vol. 1: 498-506). Holguin timely filed objections to the Magistrate Judge's recommendation. (Vol. 2: 507-518). On May 8, 2009. the District Judge adopted the Magistrate Judge's recommendation and denied and dismissed Holguin's petition. (Vol. 2: 520-521).

Holguin gave timely notice of appeal from the judgment entered by the District Judge. (Vol. 2: 522). The District Judge, however, denied Holguin's request for a certificate of appealability. (Vol. 2: 534). The Court of Appeals for the Fifth Circuit also denied Hoguin's request for a certificate of appealability.

STATEMENT OF FACTS

Complainant Terry Hughes and Holguin were neighbors. Hughes and Holguin's family lived on the

same block in Irving, Texas. (RR[1] 4: 22-24, 82; RR 5: 27-33; SX-1). Hughes lived at 1522 Mark Street and Holguin lived with various members of his family at 1527 Mark Street, although Holguin was away at school in College Station, Texas, at the time of the alleged offenses. (RR 4: 107, 124, 161; RR 5: 18, 30; SX-1).

On May 30, 1998, Hughes and two friends, complainants Ricky Coats and Paul Verdeja, were attacked by a group of men. (RR 4: 61-83). The attacks occurred around 3:00 a.m., when the complainants were returning to Mark Street from Verdeja's nearby apartment. (RR 4: 98-118).

Hughes and Coats went from Mark Street to Verdeja's apartment around 1:00 a.m. Verdeja and Hughes then drank for several hours (they bought a twelve pack of beer) and discussed Hughes' difficulties with a "punk" (Ventura) who Hughes said was trying to deal drugs with Hughes' son. (RR 4: 103-04, 117, 121, 123-24, 128, 156).

When Hughes and Coats arrived at Verdeja's apartment, Verdeja had already been drinking alone (a pint of whisky plus a prior twelve pack of beer) for about six hours; indeed, Verdeja had a blood-alcohol level of .286 by the time late in the evening when he was attacked. (RR 4: 103-04, 117, 121, 123-24, 128, 156).

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[1] RR refers to the reporter's record from Holguin's trial. The number following is the volume number.

The State presented evidence to show that Holguin and others were the persons who attacked the complainants, but the only witness that told the jury that Holguin was involved was Paul Verdeja. (RR 4: 116-17). Verdeja told the jury that he was sure that Holguin was at the scene (Verdeja said he "got to see his face") even though Verdeja had a blood-alcohol level of at least .286; even though Verdeja initially failed to identify Holguin in photo line-ups shown to him on two occasions within a week after the alleged offenses; and even though Verdeja could not say what clothing Holguin was wearing. (RR 4: 116-17; RR 4: 135-39, 149, 151-54, 161-62; RR 5: 67-69, 137-38, 148; RR 9: 52; SX-10, SX-12-13; DX-2/Ventura). Verdeja told the jury that he saw Holguin when he bent down to check on Hughes, who was on the ground after being attacked. (RR 4: 132, 153). Verdeja said that he believed, but was not sure, that Holguin is the person who hit Verdeja from his "blind side"; Verdeja said that the person hit him with a fist or with an object when he was checking on Hughes. (RR 4: 133-35, 152-54).

The State sought to bolster Verdeja's identification of Holguin by attributing a cellular telephone and pager found at the scene to Holguin. (RR 5: 138-41; SX-21, SX-22, SX-26). The State's witnesses told the jury that the damaged cellular telephone belonged to Holguin's grandmother and that the pager was registered to Holguin. (RR 5: 138-41, 164-68; RR 8: 86). The cellular records were introduced into evidence, but not a single call could be attributed to Holguin. (SX-26). As for the pager, no records were introduced except for a suspicious hand-written notation that the number was assigned to Holguin. (SX-27). Via the testimony of Andy Yi, the pager

company claimed that all records of the account were erased after the hand-written notation was made at the behest of a police investigator. (RR 5: 141, 164-72). The pager introduced in evidence was itself also questioned because one of the investigating officers initially stated, in a written report, that the pager found at the scene was crushed. (RR 4: 31; RR 5: 151). The pager introduced in evidence was not damaged, but the officer disavowed his initial characterization. (RR 5: 91-93; SX-21).

Holguin vigorously, if not effectively, contested his involvement; he presented alibi evidence to show that he was in College Station, several hours from Dallas, at the time of the alleged offenses. In this regard, Holguin introduced records from a video store in College Station showing that he rented a movie at 10:29 p.m. (RR 8: 44-45, 50, 84-106; DX-12/Holguin); he offered testimony from friends in College Station saying that he did not go to Dallas (RR 9: 7-22, 28-33); he contended that Verdeja was mistaken in identifying Holguin due to massive consumption of alcohol (RR 5: 85-97); he presented evidence to show that the investigating officers improperly attempted to coerce and influence witnesses, including Detective Seaton arranging a bond reduction for Ralph Garcia, an important witness to show Holguin's alleged "gang" involvement (RR 7: 122-27), *see* Exhibit 16, and including Detective Seaton inducing and threatening Anna Reyes, Holguin's friend, to make a false statement, disavowed in her trial testimony (the statement said that Holguin planned to see her in Irving on May 30, 1998, but did not show up and later remarked that he lost his pager and telephone), by threatening to arrest her and by leading her to falsely believe that Detective Seaton could have her brother

released from prison (RR 8: 121-23, 129, 164). Holguin presented evidence to show that his grandmother's cellular phone was probably left outside of his house by a relative when Holguin's grandmother, who lived at Holguin's house on Mark Street in Irving, was taken to the hospital late on May 29, 1998. (RR 8: 35-39, 84-98; DX-11/Holguin). Holguin also challenged the pager evidence as suspicious because it was based on a hand-written memorialization of subsequently "erased" computer records (RR 5: 140-41, 168-74); because no physical records were introduced (RR 5: 168-70); and because one officer initially indicated that the pager found at the scene was damaged. (RR 4: 31; RR 5: 151).

The State also sought to suggest that Holguin was at the scene because an automobile that Holguin drove (a Grand Am) was parked outside of his home after the alleged offenses. (RR 4: 35). In response, Holguin presented uncontroverted evidence that the automobile was left in Dallas the week before, and that on May 30, 1998, it was parked with other vehicles in or close to the driveway of his family's house. (RR 8: 96, 102). Holguin returned to Dallas from College Station the weekend before the alleged offenses to pick up furniture. (RR 8: 27-40; RR 9: 12-15). Holguin went back to College Station, with the furniture, in a truck he borrowed from another family member. (RR 9: 12-17).

On this evidence, Holguin was convicted. Subsequently, in a motion for new trial, Holguin argued that Verdeja's medical records, which were in possession of defense counsel at the time of trial, established that Verdeja had a medical condition called purulent end ophthalmitis. (Writ Hearing:39)

At the time of the incident, he would not have been able to clearly view events under the lighting conditions then existing. (Affidavit of Dr. David Stager). When asked about the failure to impeach the sole eyewitness with his then existing eyesight deficiency, defense counsel responded that he did not believe such impeachment would have affected the alibi defense and that defense counsel simply chose not to pursue that avenue of impeachment. (Writ Hearing:33-34).

REASON THE WRIT SHOULD BE GRANTED

The Fifth Circuit Court of Appeals, by denying Petitioner Holguin a certificate of appealability, has denied him his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution because defense counsel's failure to impeach the sole witness to identify Holguin as the assailant with the witness's impaired vision and ability to perceive events was undoubtedly ineffective. On this record, the factual determination that Holguin received effective assistance of counsel was objectively unreasonable. Holguin has raised a question sufficient to merit the granting of a Certificate of Appealability

How the Issue was Decided Below

Holguin's claim for relief, (claims 5-7 in his state writ) were:

Ground Five: Applicant was deprived of his right to effective assistance of counsel because trial counsel failed to question Verdeja about his visual acuity at near.

Ground Six: Applicant was deprived of his right to effective assistance of counsel because trial counsel failed to investigate the prognosis of Verdeja's case of purulent end ophalmitis.

Ground Seven: Applicant was deprived of his right to effective assistance of counsel because trial counsel failed to present evidence to show the loss of vision arising from Verdeja's case of purulent end ophthalmitis.

The state habeas court findings, adopted by the Texas Court of Criminal Appeals and appended hereto, in part, consist of findings 38-48 that since Verdeja testified that his vision was clear at the time of the offense (finding 38) and because trial counsel felt that impeaching Verdeja on this issue would detract from Holguin's alibi defense, (finding 47) trial counsel was not ineffective. (Finding 48)

The Magistrate Judge's findings which were adopted in toto by the district court, simply disposed of this issue by relying upon the presumption of correctness of the state court findings without further elucidation. (Magistrate Findings 6-7)

The Court of Appeals for the Fifth Circuit ultimately denied relief with a blanket finding that Holguin failed to raise a debatable claim.

Certificate of Appealability– The Legal Standard

To obtain a certificate of appealability, a habeas petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253. This statutory language appears to codify the standard previously announced by this Court in *Barefoot v. Estelle*, 463 U.S. 890, 893 (1983). In *Barefoot*, this Court stated that to obtain an appeal under the former statute, a habeas petitioner must present a substantial showing of the denial of a federal right. The Court further elaborated on the standard for issuance of a certificate in the following language:

> In requiring a question of some substance, or a substantial showing of the denial of a federal right, obviously the petitioner need not show he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Id. at n.4 (citations omitted). This pre-AEDPA language has been reiterated and reinforced in two subsequent opinions, *Slack v. McDaniel*, 529 U.S. 473 (2000), and, more recently, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In *Slack*, this Court reminded that [w]here a district court has rejected the [habeas petitioner's] constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484.

The role of a reviewing court during the certificate of appealability process is *not* to assess the merits of the claim. Rather, as this Court noted in *Miller-El*, when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals *should limit its examination to a threshold inquiry* into the underlying merits of his claim. *Miller-El*, 537 U.S. at 327 (emphasis added). This Court expounded on the screening role of a court under §2253 as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether the resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. *In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.*

Id. at 336 (emphasis added).

This Court's interpretation of §2253's screening function prohibits an appellate court from considering, and ruling on, the merits of a habeas petition when the petition is presented as a COA. *Id.* at 342 (reminding

that the COA determination is a separate proceeding, one distinct from the underlying merits).

Doubts about whether to issue a COA should be resolved in favor of the appellant. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); see *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991).

Holguin has made a substantial showing that the findings of the state court, as adopted without comment by the federal courts, are directly contradicted and negated by compelling medical evidence which establish that the lone witness to implicate Holguin suffered from severe vision problems at the time of the offense. Under these circumstances, the factual determination that defense counsel was not ineffective is an objectively unreasonable determination of the facts.

ARGUMENT

Relevant Facts

As stated above, only Paul Verdeja, the victim, identified Holguin as his assailant. (RR4.116-117) In an effort to show the seriousness of Verdeja's injuries, the state introduced his medical records. Among these medical records were entries that prior to the assault, Verdeja had been treated for vision problems. Even though defense counsel admittedly had these records at the time of cross examination, he failed to use them to impeach Verdeja.

In post-conviction proceedings, Holguin, through counsel, obtained the affidavit of Dr. David Stager.

Dr. Stager reviewed the very medical records that defense counsel possessed at trial. Based on his review of these records, Stager provided the court with an affidavit, unrebutted by any other medical evidence, that at the time of the offense, Verdeja "could very well ... not [be] able to clearly view events at night in a dark area. ... and [his] ability to appreciate fine details would be impaired." (Affidavit of Stager, Appendix F).

Based in part on this medical finding, the trial court conducted an evidentiary hearing. At the hearing, Verdeja stated that, in his opinion, his vision was fine, although Verdeja conceded that he had been to the doctor for an eye problem one month before the offense (writ hearing p. 48) and that he was unable to read the chart at his driver's license exam. (writ hearing p. 50-51) However, Verdeja denied that he needed glasses. (writ hearing p. 51) Defense counsel explained that he did not impeach Verdeja with these vision problems because it would detract from the alibi defense. However, defense counsel did concede that "you don't want to leave it, you know, unattacked, the identification of your client." (writ hearing p. 35)

Based on this evidentiary record, the state court found that Verdeja had good vision at the time of trial. In addressing this issue, the state court adopted eleven findings of fact proffered by the prosecutor without addition, deletion, or correction. (Findings 38-48) Not one of these findings mentions the affidavit of Dr. Stager or his unrebutted medical conclusion that Verdeja's vision was impaired at the time of the incident.

As set out above, these state court findings were then adopted in totality by the reviewing federal courts without any meaningful discussion.

Unreasonable Determination

In examining requests for federal habeas corpus relief, the federal appellate courts should review for clear error the findings of facts made by the district court. *House v. Bell*, 547 U.S. 518, 559 (2006) (concurring and dissenting opinion). Pursuant to the federal habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), deference is given to a state court's adjudication of a petitioner's claims on the merits unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002) (noting that federal habeas relief is merited only if the state court decision is incorrect and objectively unreasonable)

The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of ... [the Supreme Court's] decisions as of the time of the relevant state-court decision." *(Terry) Williams v. Taylor,* 529 U.S. 362 (2000). The inquiry into whether the decision was based on an "unreasonable determination of the facts" constrains a federal court in its habeas review due to the deference it must accord the state court.

Section 2254(d)(2) speaks to factual determinations made by the state courts. *See* 28 U.S.C. §2254(e)(1). While the federal courts presume such determinations to be correct, the petitioner can rebut. Absent an unreasonable determination in light of the record presented in the state court, the federal courts will give deference to the state court's fact findings. §2254(d)(2). *Panetti v. Quarterman*, 551 U.S. 930, 978 (2007).

Failure to Confront the Sole Eyewitness

A number of courts have found deficient performance where counsel failed to challenge the credibility of the prosecution's key witness. *See, e.g., Hamilton v. Zant*, 466 U.S. 989, 993 (1984); *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (finding ineffective assistance of counsel where, among other things, counsel's "failure to investigate prevented an effective challenge to the credibility of the prosecution's only eyewitness"); *Berryman v. Morton*, 100 F.3d 1089, 1099 (3d Cir. 1996) (finding deficient performance where counsel failed to raise the victim's prior inconsistent identification testimony, given that "[t]he reliability of this victim's uncorroborated identification of [the defendant] cut[ ] directly to the heart of the only evidence against [the defendant]"); *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9th Cir. 1994) (finding deficient performance where counsel failed to challenge an eyewitness's in-court identification in a case that "hinge[d] on an eyewitness's testimony"); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (finding deficient performance where counsel failed to confront the prosecution's star witness with inconsistent statements, thus "sacrific[ing] an opportunity to weaken the star witness's inculpatory

testimony"); *Blackburn v. Foltz,* 828 F.2d 1177, 1183 (6th Cir.1987) (finding deficient performance where counsel failed to impeach an eyewitness with previous inconsistent identification testimony when "weakening [the witness's] testimony was the only plausible hope [the defendant] had for acquittal"). *Beltran v. Cockrell,* 294 F.3d 730, 733 -734 (5th Cir. 2002) (consciously leaving unchallenged sole eye witness to assault); *Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006).

Although none of these fact patterns are identical to the instant case, they coalesce to establish a doctrine that failure to impeach the state's key witness is emblematic of ineffective assistance of counsel. Thus, given that federal courts have found deficient performance under analogous scenarios, the factual determinations in this case are objectively unreasonable.

Lack of Strategy

Additionally, the state court's findings are based on a false dichotomy. Far from being inconsistent, the alibi defense and the "visual impairment" theory, which could have been explained to the jury by expert testimony from an opthamologist , support each other. Holguin was not the assailant. Holguin was not present at the time of the assault. In fact, the trial attorney's testimony specifically concedes that there is no strategic value in foregoing impeachment of the state's key witness. In other words, trial counsel understood the importance of the "visual impairment" theory. He just did not present the expert testimony available to him to establish it. Contrary to the findings of fact, it is well settled that such decision making is not accepted as "strategy"

Strickland advises that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Burger v. Kemp*, 483 U.S. 776, 794 (1987)(*citing Strickland*, 466 U.S. at 690-91). "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. at 527 (2002). The Supreme Court has admonished that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* (*citing Strickland*, 466 U.S. at 691). Counsel has an obligation to contact the witnesses and review the reports in advance of trial so that a fair determination of the evidence can be made. *Williams v. Taylor*, 529 U.S. 362 (2000). Failure to follow up on established leads or known defenses, and failure to be prepared to effectively present such defenses, is not excusable. To paraphrase this Court "[t]he right to present, and to have the [factfinder] consider, any and all evidence means little if defense counsel fails to look for evidence or fails to present a case in defense." *Strickland v. Washington*, 466 U.S. 668, 706 (1984). As Justice Stevens noted in his dissenting opinion in *Wood v. Allen*, 130 S.Ct. 841, 853 (2010) "A decision cannot be fairly characterized as "strategic" unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance, inattention, or neglect. See *Wiggins*, 539 U.S. at 526, 123 S.Ct. 2527 (concluding that

counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *Strickland,* 466 U.S. at 690-691, 104 S.Ct. 2052. Moreover, "a cursory investigation" does not "automatically justifly] a tactical decision with respect to sentencing strategy." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527. Although we afford deference to counsel's strategic decisions, *Strickland,* 466 U.S. at 690-691, 104 S.Ct. 2052, for this deference to apply there must be some evidence that the decision was just that: strategic." In this instance, the finding that trial counsel pursued a reasonable strategy is patently erroneous.

Finally, the medical evidence, including the opinion of Dr. Stager, was unrebutted by the state. Only Verdeja's protestations that he could see fine contradicted the great weight of the medical testimony and records. These conclusively established that Verdeja's vision at the time of the assault was necessarily impaired. That the state court utterly failed to mention this evidence is the strongest demonstration that the fact finding was unreasonable in both process and result. In making a reasonable factual determination, the court should look to the record as a whole. See *Wiggins v. Smith*, 539 U.S. 510, 512 (2003). The state habeas court here did not do so, and reasonable jurists could disagree as to whether the decision to disregard the compelling medical evidence resulted in an "unreasonable determination." The United States Court of Appeals for the Fifth Circuit erred in not so finding.

SUMMARY

Petitioner Holguin was convicted on the testimony of one crime victim with vision problems so severe that he lacked the ability to see clearly at night, even from a short distance. However, the jury never heard of that significant deficiency, because trial counsel never mentioned it, even though it was in his records. Trial counsel attempted to excuse this neglect by claiming "trial strategy," even though he was forced to admit that impeachment of the witness was crucial. The state court wrote around the victim's lack of visual acuity by utterly failing to mention the pertinent medical testimony in the findings. These very findings were then improperly accorded complete deference by the reviewing federal courts. Those omissions were, and are, objectively unreasonable within the meaning of 28 U.S.C. §2254(d)(2). No rationale finder of fact would have convicted the Petitioner on the eyewitness testimony of a victim who was essentially night blind. Petitioner has asserted a sufficient basis for his claims to merit appellate review. This relief must be granted.

Respectfully submitted

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-10525
USDC No. 3:08-CV-905
USDC No. 3:08-CV-906
USDC No. 3:08-CV-907

[Filed February 25, 2010]

CANDELARIO HOLGUIN, JR.,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas

ORDER:

Candelario Holguin, Jr., who is represented by counsel, moves this court for a certificate of

appealability (COA) to appeal the district court's decision to deny his 28 U.S.C. § 2254 application. A Texas jury found Holguin guilty on three counts of participating in organized criminal activity, and he was sentenced to three concurrent 45-year prison terms. Holguin argues that his trial counsel was constitutionally ineffective for (1) failing to investigate and present evidence regarding the eyesight of the State's key witness; (2) failing to investigate and impeach the witness with a prior assault conviction; and (3) failing to move to suppress the witness's in-court identification of Holguin.

Holguin is entitled to a COA if he makes a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To meet that standard, he must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Holguin has failed to do so; thus, his motion for a COA is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

USDC 3:08-CV-0905-B
USCA 09-10525

[Filed July 10, 2009]

CANDELARIO HOLGUIN, JR.
Petitioner,

v.

NATHANIEL QUARTERMAN,
Texas Department of Criminal Justice,
Correctional Institutions Div.,
Respondent.

ORDER OF THE COURT ON THE FOREGOING RECOMMENDATION

Considering the record in this case and the recommendation of the Magistrate Judge, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253 (c), the Court hereby finds and orders:

IFP STATUS:

(X) the party appealing paid the appellate filing fee

COA:

( ) a Certificate of Appealability is GRANTED on the following issues: _____

(X) a Certificate of Appealability is DENIED. The Court herbey adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation filed in this case on January 8, 2009, in support of its finding that Petitioner has failed to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

SIGNED this 9th day of July, 2009.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

3-08-CV-905-B
(Consolidated with 3-08-CV-906-B and 3-08-CV-907-B)

[Filed May 8, 2009]

CANDELARIO HOLGUIN, JR.	)
	)
v.	)
	)
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice Correctional Institutions Division	)

JUDGMENT

The Court has entered its Order Accepting the Findings, Conclusions and Recommendation of the United States Magistrate Judge in this case.

It is therefore ORDERED, ADJUDGED AND DECREED that the petition be, and it is hereby denied and dismissed.

A copy of this judgment shall be transmitted to counsel for Petitioner and counsel for Respondent.

SIGNED this 8th day of May, 2009.

/s/Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3-08-CV-905-B
(Consolidated with 3-08-CV-906-B
and 3-08-CV-907-B)

[Filed May 8, 2009]

CANDELARIO HOLGUIN, JR.	)
	)
v.	)
	)
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice Correctional Institutions Division	)

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge William F. Sanderson, Jr., made findings, conclusions and a recommendation in this case. Plaintiff filed objections, and the District Court has made a *de novo* review of those portions of the proposed findings and recommendation to which objection was made. The objections are overruled, and the Court accepts the

Findings, Conclusions and Recommendation of the United States Magistrate Judge.

SO ORDERED this 8th day of May, 2009.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3-08-CV-905-B
(Consolidated with 3-08-CV-906-B
and 3-08-CV-907-B)

[Filed January 8, 2009]

CANDELARIO HOLGUIN, JR.	)
	)
v.	)
	)
NATHANIEL QUARTERMAN, Director,	)
Texas Department of Criminal Justice	)
Correctional Institutions Division	)
	)

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b), and an order of the court in implementation thereof, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for habeas corpus relief filed by a State inmate pursuant to 28 U.S.C. § 2254.

Parties: Petitioner is confined as an inmate at the Telford Unit of the Texas Department of Criminal Justice, Correctional Institutions Division in New Boston, Texas, serving state felony convictions imposed in Criminal District Court No. One of Dallas County.

Respondent is the Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

Statement of the Case: Petitioner entered pleas of not guilty to the offense of engaging in organized criminal activity[1] as charged in the indictments returned in Cause Nos. F-98-02888-KH, F-98-02889-KH and F-98-02890-KH. The jury found him guilty of each charge and he was sentenced to concurrent 45 year terms of imprisonment together with monetary fines.

He appealed all three convictions and on February 15, 2001, the Eighth Court of Appeals at El Paso issued three identical opinions affirming Holguin's convictions. His subsequently filed petitions for discretionary review were refused by the Court of Criminal Appeals on September 12, 2001. On February

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[1] The respective indictments charged violations of the Texas Penal Code Ann. § 71.02 (a)(1) (Vernon Supp. 2001).

19, 2002, his petition for writ of certiorari was denied by the United States Supreme Court.

On January 13, 2003, he filed three applications for habeas corpus in Criminal District Court No. One pursuant to art. 11.07, Texas Code of Criminal Procedure, setting out identical grounds for relief. An evidentiary hearing was held before a state magistrate judge on October 15, 2004. On April 29, 2005, Holguin filed amended art. 11.07 applications attacking each conviction. On February 23, 2007, the trial court adopted the State's proposed findings of fact and conclusions of law, recommending that relief be denied. Thereafter the trial court made supplemental findings of fact and conclusions of law on April 14, 2008. On April 30, 2008, each of the art. 11.07 applications - No. WR 67, 454-01, No. WR 67, 454-02 and No. WR 67, 454-03 - was denied by the Court of Criminal Appeals without a written order based on the findings of the trial court after a hearing.

Petitioner then filed three separate § 2254 petitions in this court on May 28, 2008, attacking his state court convictions. *See* Nos. 3-08-CV-905-B, 3-08-CV-906-M and 3-08-CV-907-B. Because all three convictions resulted from a single trial and the grounds raised in each petition are identical, the latter two cases were consolidated with the petition docketed in 3-08-CV-905-B.

In response to this court's show cause order Respondent has filed his answer and copies of prior state court proceedings.[2]

Findings and Conclusions: Holguin stands convicted of engaging in organized criminal activity as charged in three separate indictments, each of which identified a separate individual as the victim of the offense. The injuries to the victims were so severe that two of the three were unable to testify due to permanent brain and physical injuries. Only Paul Verdeja was able to testify and in the course of his trial testimony he positively identified Petitioner as one of the persons who committed the aggravated assaults against him and the other two.

In seven separate grounds for relief Holguin claims that his retained trial attorney rendered ineffective assistance of counsel in failing to conduct a criminal background investigation of Paul Verdeja and in failing to pursue certain avenues of impeachment of Verdeja's trial testimony.

Ineffective assistance of counsel claims are governed by the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a habeas petitioner must show that the attorney's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. The Court made clear that every effort should be made to eliminate the

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[2] The record consists of portions of the transcribed proceedings from Holguin's trial, a transcript of the habeas corpus evidentiary hearing on October 15, 2004, and copies of the three art. 11.07 applications.

distorting effects of hindsight in assessing an attorney's performance given that "[I]t is all too easy" to find an unsuccessful strategy to be unreasonable, after the fact, and "since there are countless ways to provide effective assistance in any given case, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Second, a convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A failure to prove either prong of the *Strickland* test forecloses relief. *Id.* at 697.

In addition, before a state prisoner is entitled to federal habeas relief after his claims have been rejected by the state courts, he must establish that the decision rendered in the state court system was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

As related in the course of the post-conviction evidentiary hearing in the state court and as is self-evident from the evidence presented on Holguin's behalf at trial, the defense's theory was one of alibi. *See* William Bratton's testimony, No. WR-67,454-01, Writ Hearing on October 15, 2004, at 9-12. At trial Bratton called six witnesses to show that Petitioner

was in College Station at the time the assaults took place in Irving. The evidence included documents as well as testimony from records custodians.[3] In light of the circumstantial and directed evidence, the alibi evidence - if accepted by the jury - would have shown that Holguin was several hundred miles away from the assaults on or about May 30, 1998, or at least might have been sufficient to create a reasonable doubt as to whether Verdeja's identification of him as one of the assailants was correct.

Although seven separate grounds are alleged, all relate to possible avenues of impeaching Verdeja's testimony which were either not investigated or were not exploited by Bratton at trial. Petitioner's first four grounds relate to well-established impeachment evidence, to wit: a witness's conviction for a crime of moral turpitude, (Grounds One and Two) and a showing that a witness's testimony was obtained in exchange for lenience or favorable treatment from law enforcement authorities (Grounds Three and Four).

In the art. 11.07 applications the state district court made specific findings of fact with respect to these grounds. *See e.g.* WR 67,454-01, at 260, adopting State's Proposed Findings of Fact and Conclusions of Law and at 246-258. The state district court found that Verdeja's criminal conviction was made known to Mr. Bratton, but that his misdemeanor family violence

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[3] *See* testimony of James Oliver, Reporter's Record, Vol. 8 at 27, *et seq.;* Janet Kinney's testimony, *Id.* at 35, *et seq.;* testimony of Lee Walker, *Id.* at 40, *et seq.;* Noemi Velasquez's testimony, *Id.* at 84, *et seq.;* testimony of Justin Mahoney, Reporter's Record, Vol. 9 at 7, *et seq.;* and Patricia Villalpando's testimony, *Id.* at 25, *et seq.*

assault conviction was not used to impeach Verdeja. *See* ¶¶ 20-24 at 252. At the evidentiary hearing held in October 2004, more than five years after the criminal trial concluded, Bratton related his opinion that a conviction for a crime of moral turpitude was of limited use where the defense was alibi. *See* Habeas Corpus Hearing, Reporter's Record at 16-17. He further stated that his strategy was to keep the jury focused on the defense that Holguin simply wasn't at the scene. *Id.* at 31 and at 34-35. He also recognized that the victims, including Verdeja,[4] had suffered serious injuries. *See* Reporter's Record Vol. 9 at 88.

Even though Bratton did not choose to impeach Verdeja's veracity with his misdemeanor conviction, his cross-examination of Verdeja at trial brought out a number of factors, including his inebriated state at the time of the assaults, in an effort to raise an issue with respect to Verdeja's ability to see and to accurately identify Petitioner as one of the assailants.[5] In its findings of fact the state court explicitly enumerated the matters which Bratton established on cross-examination in an effort to undermine Verdeja's identification. *See e.g.* WR-67,454-01, *supra*, ¶ 25 at 253. Finally, the state district court's findings concluded that Bratton's efforts conformed with the requirements of the Sixth Amendment and further that Holguin failed to prove that he was prejudiced by the fact that Verdeja's misdemeanor conviction was

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[4] In the course of the evidentiary hearing Verdeja himself related the permanent visual impairments with which he suffers as a result of the beating. *Id.* at 46-47.

[5] These factors were reiterated in the attorney's closing argument. *See* Reporter's Record Vol. 9 at 94-95.

not presented to the jury. *Id.* at ¶ 27-29. As noted above, the Texas Court of Criminal Appeals denied relief on the findings of the state trial court.

The record and the findings of fact by the state courts establish that Verdeja was never advised that he would receive any favorable treatment with respect to his Denton County family violence conviction. This issue was fully explored at the hearing on Holguin's motion for new trial, at the conclusion of which the trial judge denied the motion. The issue was raised in two points of error in his direct appeal and was rejected by the intermediate appellate court. *See e.g. Holguin v. State,* No. 08-99-00354-CR (Tex.App.-El Paso February 15, 2001) unpublished opinion at 5-10. The Texas Court of Criminal Appeals refused his petitions for discretionary review in which the same issues were raised. Such findings of fact and credibility determinations are presumed to be correct. *Summers v. Dretke,* 431 F.3d 861, 871-72 (5th Cir. 2005) (citing §2254(e)(1)).[6]

In his fifth and sixth grounds for relief Holguin faults his trial counsel for failing to present evidence to show that Verdeja's visual impairments at the time of the assault rendered him unable to see and identify Petitioner as one of the assailants. In addressing this claim and his attorney's failure to present medical evidence to establish that Holguin had a significant

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[6] In disposing of these claims in the art. 11.07 applications, the state district court held that the question of whether Verdeja had been granted any benefit in exchange for his trial testimony was procedurally barred and in the alternative found that the evidence established that no favorable consideration was extended to him. *See* e.g. WR 67-454-01, *supra*, ¶¶ 30-37 at 254-256.

visual impairment, the state district court made specific, presumed correct findings of fact which foreclose satisfying the other prong of the *Strickland* test. *See e.g.* WR 67,454-01, *supra,* ¶¶ 38-48 at 256-258.

In his final ground for relief Petitioner attacks his attorney's failure to pursue a motion to suppress Verdeja's in-court identification. In order to prevail on this ground Holguin is required to prove that as a matter of law a timely filed motion to suppress would have resulted in a ruling by the trial court prohibiting Verdeja from effecting in the jury's presence an in-court identification of him as a perpetrator of the assaults.

As related in the fact findings in the state habeas proceedings, Mr. Bratton sought to undercut the validity and weight of Verdeja's in-court identification in a myriad of ways. *See e.g.* WR 67,454-01, *supra,* ¶ 25 at 252. On the other hand Verdeja testified that he could have identified Holguin as an assailant without ever having seen any photo spreads. Reporters' Record, Vol. 4 at 151. Despite the negative factors which the attorney presented to the jury, such go to the weight of the evidence rather than to its admissibility. As the United States Supreme Court made clear in *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977), "reliability is the linchpin in determining the *admissibility* of identification testimony..." (Emphasis added). In *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972), the Court identified factors to be considered in the "totality of circumstances" in determining the reliability factor. In *Manson* the single photograph spread rendered the out-of-court identification unduly suggestive. Notwithstanding this circumstance the Court

concluded that under *all* the circumstances, it could not be said that there was "'a very substantial likelihood of irreparable misidentification'... Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116. Accordingly Petitioner cannot show that a timely suppression motion would have been granted.

CONCLUSION:

For the foregoing reasons Petitioner has failed to demonstrate that he was deprived of the effective assistance of counsel by his trial attorney. But as set out above, in order to be entitled to federal habeas corpus relief he has the even greater burden of showing that the state court's rejection of his multiple allegations of ineffective assistance of counsel was contrary to, or involved an unreasonable application of the Supreme Court decision in *Strickland v. Washington*. *See e.g. Yarborough v. Gentry,* 550 U.S. 1,5 (2003). Having failed to satisfy this heavier burden as well Holguin is not entitled to relief.

RECOMMENDATION:

For the foregoing reasons it is recommended that the petition be denied and dismissed.

A copy of this recommendation shall be transmitted to counsel for the Petitioner and counsel for Respondent.

SIGNED this 8th day of January, 2009.

/s/ Wm. F. Sanderson, Jr.
WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten-day period may bar a de novo determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

APPENDIX F

IN THE CRIMINAL DISTRICT COURT
NUMBER TWO
DALLAS COUNTY, TEXAS

WRIT NOS. **W98-02888-H(A),**
W98-02889-H(A),
W98-02890-H(A)

[Filed February 23, 2007]

EX PARTE	)
	)
CANDELARIO HOLGUIN, JR.	)
	)

ORDER ADOPTING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court hereby adopts and incorporates herein the above proposed findings of fact and conclusions of law submitted by the State in *Ex parte Candelario Holguin, Jr.*

Excerpts of Proposed Findings:

. . .

38. This Court finds that, during Applicant's trial, Mr. Verdeja testified thathe could see clearly at the time of the offense, and he did not wearglasses or corrective lenses of any kind. (TR4:136).

39. This Court finds that, during the offense, a bone under Mr. Verdeja'seye was broken and his eye swelled; since that time, he has "flickers"and a loss of vision in one eye. (TR:115; WR:54).

40. This Court finds that, during the writ hearing on October 15, 2004, Mr.David Stager erdeja testified that he had begun using reading glassesabout a year after his beating during this offense. (WR:46).

41. This Court finds that, in 1998, before the assault in the instant case, Mr.Verdeja went to Concentra Medical because his eye was swollen dueto cold or sinus problems; his vision was blurry at that time, but doctorsgave him some eye drops and the problem cleared up in about two days. (WR:48,50).

42. This Court finds that, after this assault, Mr. Verdeja's eyes were watery,he could not see as clearly, and he had to quit his job as a machinistbecause he could no longer see very small measurements with his nakedeye; however, Mr. Verdeja's eyes did not begin to deteriorate until afterthe beating he received in this offense. (WR:54-58).

43. This Court finds that the record shows that, on the night of the instantassault, Mr. Verdeja was not having any problems with his vision, hewas able to see Applicant's face,

and he was close enough to Applicantto touch him. (TR4:117, 153-54; WR:58).

44. This Court finds that, both at the time of trial and at the time of the writ hearing, Mr. Verdeja had no doubt that Applicant assaulted him. (TR4:117-118; WR:58).

45. This Court finds that Applicant has incorrectly claimed in his writapplication that Mr. Verdeja "apparently failed to correctly identifyapplicant after the assault" (Amended Writ Application, p. 9); in fact,the record shows that Mr. Verdeja correctly identified Applicant'sphotograph both times he was shown lineups with Applicant's picturein them, although Mr. Verdeja did have some difficulty identifying aphotograph of another person. (TR4:148-50).

46. This Court finds that defense counsel Bratton asked Mr. Verdeja during trial if he wore glasses, but, as a matter of strategy, Mr. Bratton did not pursue many questions about Mr. Verdeja's eyesight because his eyes were injured in the assault. (WR:33).

47. This Court finds that Mr. Bratton was pursuing a trial strategy of keeping the jury focused on his defense theory of alibi and not wanting the jury to "get side-tracked by getting into other battles" about Mr. Verdeja's eyesight. (WR:34).

48. This Court concludes that, because the record shows that Mr. Verdeja had good

vision at the time of trial, counsel was not ineffective for failing to ask Mr. Verdeja more questions about his vision and was not ineffective for failing to present medical evidence that Mr. Verdeja would not have been able to see Applicant up close.

. . .

SIGNED AND ENTERED this 23rd day of February, 2007.

/s/ Don Adams
Judge Don Adams
Criminal District Court No. 2
Dallas County, Texas

APPENDIX G

CRIMINAL DISTRICT COURT NUMBER ONE
DALLAS COUNTY, TEXAS

Trial No. F98-02888-KH
Trial No. F98-02889-KH
Trial No. F98-02890-KH

[Dated January 6, 2003]

The STATE OF TEXAS	)
	)
V.	)
	)
Candelario Holguin, Jr.	)
	)

AFFIDAVIT OF DAVID STAGER, JR., M.D.

DAVID STAGER, JR., M.D., STATES AS FOLLOWS:

"My name is DAVID STAGER, JR. I am a medical doctor licensed to practice and practicing in the State of Texas. My Texas Driver's License Number is 10025796. My office address is 8201 Preston Road, Suite 140, Dallas, Texas 75225.

My field of practice is ophthalmology. I have approximately eleven (11) years of experience in the field of ophthalmology.

I have reviewed the attached typewritten and handwritten consultation reports as to patient Paul Verdeja, seen by consulting physician David Gregory on 5/30/98. I have also reviewed the attached reports from 4/8/98 from Concentra Medical.

The reports indicate that Mr. Verdeja's visual acuity without correction (without glasses or contacts) AT NEAR was 20/40 OD (right eye) and 20/50 OS (left eye) on 5/30/98. The numbers mean that his vision was abnormal; the numbers represent a decrease of two that of a normal person in the right eye and more than two times in the left eye. This could very well translate to a person not being able to clearly view events at night in a dark area. The person will likely be able to function in day to day events, but their ability to appreciate fine details would likely be impaired.

The reports further indicates that Mr. Verdeja was treated or diagnosed on 4/7/98 for purulent endophthalmitis, a very serious infection involving the interior of the eye. A substantial portion of these cases involve permanent visual impairment, even with successful treatment.

"Further Affiant sayeth not."

SIGNED on 1/6, 2003

/s/ David Stager, Jr., M.D.
DAVID STAGER, JR. M.D.

/s/ Elizabeth Milan
NOTARY PUBLIC, STATE OF TEXAS

Date: 1/6/03

[Seal] ELIZABETH MILAN
NOTARY PUBLIC
State of Texas
Comm. Exp. 03-07-2004